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BY FAX AND MAIL

August 13, 2008

Mr. Kelly Keenan Esq.
Legal Counsel to the Governor
The Honorable Jennifer M. Granholm
George W. Romney Building
111 South Capitol Avenue
Lansing, Michigan 48909

Re: Your letter of August 12, 2008 regarding immunity issues

Dear Mr. Keenan,

Thank you for your letter of August 12th, in response to the immunity issues raised in our prior letter to you.

As to the issue of legislative immunity, we hope, in this correspondence, to clarify for you our concerns: Ordinarily, legislators do have immunity from testifying in a matter about which they voted. However, in this case, since they petitioned the Governor and it is the "factual basis" that they supplied upon which she proceeded initially, the statements of the Council members are not a subject of the legislative process to which immunity will attach. Moreover, speeches given by all of the five members to the media are not protected from inquiry, as they are not part of a necessary law-making process. See Hutchinson v. Proxmire, 443 U.S. 111 (1979)

As the "judge" in the hearings that the Governor intends to hold on September 3rd, she will be the one to rule on whether the Council members who forwarded the request to her will be required to testify. We respectfully suggest to you that we have a due process right to know before the hearing begins, whether we will be able to question and confront the witnesses against our client. In that the Governor will be considering the same



allegations of "facts" that underlie the Prosecutor's case, it will be important to have a ruling from her on this issue. Thus, the issue then, more artfully put, is whether in the Governor's (the "court" in this matter) view, these petitioners will be required to testify. We ask that the Governor rule on this issue before the hearing date, in sufficient time to allow for preparation by the Respondent. Specifically, in that the Council alleges that they were denied "informed consent" (oddly enough, a medical term), they must be subject to cross examination on that issue.

Relative to the issue of immunity for the Respondent and/or other witnesses, our position is that the Governor, as the head of a governmental unit, may not hold an administrative hearing while criminal charges are pending at which she inquires into the factual basis for those criminal charges, unless immunity has been conferred upon the Respondent. Gardner v. Broderick, 392 U.S. 273 (1968) and Lefkowitz v. Cunningham, 431 U.S. 801 (1977). In this case, the sole issue (per your statements to the Detroit Free Press, as they appeared in the newspaper on Sunday, August 10th) is whether the Mayor "misused public funds for personal gain": In that the misuse of public funds issue necessarily requires inquiry into the motives (intent) of the Mayor in settling the case at issue, it is only he who can provide the testimony as to his own intent. Circumstantial evidence, if there were any competent circumstantial evidence, would have to include more than a timeline between the extortion threat by Stefani and the settlement of the case. It is axiomatic that a governmental entity may not use a civil or administrative proceeding to shift the burden of proof to the defendant where criminal charges are pending and his testimony may be used against him in a subsequent criminal proceeding.. The Council has held its investigation and found no evidence, save the timeline which we respectfully aver is insufficient to sustain even the burden of proof applicable to a civil case.

Assuming, for the sake of argument, that the Governor sees the timeline, in the context of her hearing, as sufficient proof of intent, it becomes even more important that the Mayor testify as to his intent, if and when he made the decision, etc. This, of course, would require him to surrender his Fifth Amendment privilege which he could not do without some protection. In that the Governor, by agreement of all of the parties, has been meeting with the Prosecutor and others, it is a matter that should be taken up by the Governor with the Prosecutor.

While we appreciate your references to the statute under which the Governor is proceeding, as you know, there are no procedures and there is minimal case law interpreting her powers. In fact, as Governor, she is authorized to issue a pardon, which would be the equivalent of state immunity on the charges filed by the Prosecutor. Thus, she could inquire of the Prosecutor as to the immunity issue or, alternatively, she could issue a pardon, thus clearing the way for the Mayor to testify on September 3rd at the Governor's hearing.



In any administrative or civil case, the parties are entitled to discovery, to cross-examine witnesses, to obtain documents that the opposition intends to introduce, etc. The Governor's hearing, carrying with it the enormous penalties that it does, must ensure that the Respondent has the due process rights that he is entitled to have in such a proceeding.

As your letter of August 12th invites the filing of "a motion that identifies and relies upon contrary legal authority", we will file the motion within a few days.

It is precisely for the reasons articulated in this letter that we have asked that the Governor stay her proceedings until resolution of the Prosecutor's charges: In a civil or administrative matter in which the penalty is a dismissal, the United States Supreme Court has held

"When a governmental entity compels testimony by threatening to inflict potent sanctions unless the privilege against self incrimination is surrendered, that testimony is obtained in violation of the Fifth Amendment" See Lefkowitz, supra

We will file the motion that your letter suggests: However, given the authority cited herein, we hope that you will address these issues prior to that time.

Sincerely,

Sharon McPhail

Counsel to the Honorable Kwame M. Kilpatrick

Cc: William Goodman
David Whitaker
James Thomas
Daniel Webb
James Parkman